IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 370

ARNOLD W. KRAUSE and COOT TOWNS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA on Claimant to and Condemnation of the Fund deposited with the Treasurer of the United States on Account of Just Compensation for the 365 Acres,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARNOLD W. KNAUTH and CODY FOWLER,

Petitioners,

VS.

THE UNITED STATES OF AMERICA as Claimant to and Custodian of the Fund deposited with the Treasurer of the United States on Account of Just Compensation for the SS ARAUCA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pro se respectfully pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case dated July 21, 1950, and to restore the decree of the United States District Court for the Southern District of Florida, Miami Division, entered the 24 day of August, 1949, as amended and entered on the 17 day of October, 1949 (R. pp. 84, 105).

Opinions Below

The conclusions of law (in the form of an opinion) of the United States District Court for the Southern District of Florida (R. 110) are not reported in the Federal Reporters —they are reported in 1950 A. M. C. 1434. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 155) is not yet reported in Fed. 2d. It is reported in 1950 A. M. C. 1438.

Jurisdiction

The decree of the Court of Appeals was entered on July 21, 1950 (R.). The jurisdiction of this Court is invoked under new Title 28, U. S. Code, section 1255, enacted by the Act of June 25, 1948.

Questions Presented

1. Whether the fact that the petitioners had not literally filed a libel or complaint and had not literally effected an attachment of the SS *Arauca* prior to the moment when the Government (Maritime Commission) requisitioned the SS *Arauca* and took title to her on July 27, 1941, at Port Everglades, Florida, in the Southern District of Florida, bars the petitioners from access to the Fund subsequently created by cash deposit with the Treasurer of the United States "on account of just compensation" for the requisition.

2. Whether the petitioners had a lien,—attorney's, maritime, or any other.

3. Whether the proceeds of the cargo can be used to pay the petitioners' claim.

4. Whether the successor attorney must see that the predecessor is paid, or may take his work without payment.

Statutes Involved

The relevant portions of the Idle Foreign Vessels Act of June 6, 1941, 50 U. S. Code Appendix, s. 1271, 1941 A. M. C. 1013, and its 1943 amendment, Act of March 24, 1943, sec. 3-a, 50 U. S. Code App. S. 1293-a, are printed in the Appendix.

Statement

On June 6, 1941, when the United States had not yet entered the war then in progress in Europe, there were numerous Danish, Finnish, French and other vessels of friendly countries in our ports, immobilized and afraid to sail because of actions of the British Navy and the German U-boats at sea. Congress enacted the Idle Vessels Act to authorize their requisition against promises of payment of just compensation to their owners. The Act expressed by analogy the right of angary which exists when a nation is itself at war and requires the use of neutral shipping in its ports. The President delegated the power to requisition; Executive Order 8771, dated June 6, 1941, 6 Fed. Reg. 2759; 1941 A. M. C. 1041, authorized the Maritime Commission to requisition if, as and when it found it suitable to do so. Thereafter, by a series of single acts—ship by ship—the Maritime Commission and its successor War Shipping Administration adopted resolutions to requisition some 80 ships. These resolutions were not published in the Federal Register, and in almost all cases there was no publication of the date of any particular taking of any one ship. See 7 Fed. Reg. 2823, 5034, 7183. The procedure in the *Arauca* case was that the Maritime Commission men went on board and took possession. The Marshal had her in custody. He yielded to the Executive's men and four days later (July 31) reported what had happened to the Court (R. 118), whereupon the Court set an ex post facto hearing (August 2) and made an ex post facto order

(August 5) approving the Marshal's action in yielding up possession (R. 118, 121, 124, 127, 128, 129). Thereby counsel learned what had happened. The public was informed through newspaper stories. A feeling grew that a Marshal should not yield in this informal manner, and about two years later, by amendment, Congress expressly authorized Marshals to yield to Executive requisitions when filed with the Court: Act of March 24, 1943, s. 3c (Commonly called the WSA Clarification Act, 50 U. S. Code Appendix, s. 1293-c).

The Act did not say that valuation and payment should be "prompt"; and the administration of the valuation and payment provisions was leisurely. It was presently thought that it would be convenient to make "token deposits" "on account of" just compensation, in order to start the six-months' time running for filing claims against the Funds as substitutes for the ships. 57 such token deposits were made. See 7 Fed. Reg. 2823 (Danish), 5034 (Finnish), 7183 (Estonian, French). It was doubted whether anything less than a deposit of 75 percent of the appraised valuation would satisfy the law, and Congress amended the Act to given express permission to make lesser payments as "advances on account". Act of March 24, 1943, sec. 3-a (50 U. S. Code Appendix, s. 1293-a). This amendment stated a new time limit—

> "the holder of any such *claim* may commence prior to June 30, 1943 or within six months after the first such deposit with the Treasurer and publication of notice thereof in the Federal Register, whichever date is later, and maintain in the U. S. District Court—etc."

This made it quite clear that the public had no concern with the date of the requisition. The public is only concerned with the date of the first deposit of a sum of money as an advance on account of just compensation. That is the date which revives the rights of the public which had been forcibly suspended by the requisition. Between the more or less secret requisition date and the publication of the

date of deposit of just compensation money, the rights of the public are inchoate—suspended.

This was thought to be necessary to avoid legal or physical interference with the program in the days of national emergency prevailing on and after June 6, 1941.

The 1943 amendment gave the requisitioning authority the power to abandon a requisition of title. Such abandonment of course revives the rights of the public. One vessel, at least, was thus de-requisitioned, and again became subject to arrest or attachment just as though no requisition had taken place. *The Nordpol,* 11 Fed. Register 8512.

Due to lack of public record, the progress of the requisitions cannot be traced; but within less than 8 weeks, on July 28, 1941, the Maritime Commission men came on board the German dry cargo vessel *Arauca* which lay, intact and not sabotaged and laden with a cargo, at Port Everglades, in Miami Division. There was no advance notice whatever. The petition, hearing and order were ex post facto (R. 118).

At the moment of requisition, the *Arauca* was in custody both of the Marshal and of the Coast Guard. The Marshal held her under foreign attachment process of six admiralty libels for alleged cargo losses, damages or general averages concerning some ten other vessels in whose operations the Hamburg American Line had had an interest. The Coast Guard had come aboard early in April, 1941, and had put the German crew on shore, where they remained as alien seamen off a ship; the incident was connected with a Presidential cruise and is described in Mr. Sherwood's book: *Roosevelt and Hopkins,* at page 278.

The *Arauca* had previously been attached in December, 1939, in another series of libels, which were settled and paid off in September, 1940, those lawyers' fees being paid up at that time. The later libels pending at the moment of requisition were filed at various dates after October, 1940. One—the Duval libel—was filed on May 15, 1941, and another—the Sun General Average libel—was filed on July

11, only 2 weeks before the requisition, and after the "freezing" order.

Petitioners had been retained by Hamburg American Line's New York office and were counsel of record in the lawsuits wherein the *Arauca* was attached; and her attachment was the source of jurisdiction at Miami, and not merely a security. The Hamburg Line made no effort to bond or release the ship; she remained in the Marshal's custody. She was short of fuel; her bottom was weedy; the Germans could not expect her to make a blockade-running ocean passage. Her crew was ashore. She was a fixture. Prior to the "freezing" order next described, the Hamburg Line had paid your petitioners retainers in four of the six cases filed prior to the freezing; the seventh case was filed after the "freezing" order, so that a retainer was impossible.

On June 14, 1941, the President issued his "freezing" order, Ex. O. No. 8785, 6 Fed. Reg. 2897, which put all bank accounts under license; and from that date the Hamburg Line's New York office received no licenses and was unable to pay its lawyers any retainers or fees or disbursements. It continued to be perfectly lawful for the Hamburg Line to defend these suits (even after war began on December 11th, 1941), for the Trading With the Enemy Act provides —what is probably the law anyway—that:

> "An enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."
>
> Trading with the Enemy Act, sec. 7(b), par. 3, 2d proviso, 50 U. S. Code Appdx, sec. 7(b)

But on June 14, 1941, it became unlawful for Hamburg Line to pay a lawyer a retainer, fee or disbursement without a license; and the Executive refused to issue a license. Your petitioners worked very actively on these cases for about 15 weeks after the freezing period, expecting that suitable fees under proper licenses would be worked out

in due course under proper procedures. A $500 license to *settle* the *Melchior* case was issued on June 27. But a corresponding license to pay the lawyer's *fee* was not issued. At the end of that active working period, each case was in fairly good shape for defense; and in any event each preparation had been carried as far as possible under the shadow of the approaching war which broke in December.

It was a surprise that the Executive requisitioned the *Arauca* for Just Compensation. Rarely had our Government, while a neutral, exercised its sovereign power over a merchant ship flying the flag of a nation engaged in war (Hackworth, § 609). It was thought quite extreme to invoke the right of angary (while we were neutral) in respect of ships of Denmark and France and Estonia and Latvia, in 1941. If war was coming, it was normal to await the event and then take this German ship (and the 39 Italian ships) under the laws of prize. The Government did not use Prize law. It has followed a by-pass course; it seized this about-to-become-enemy ship under the fair promise of just compensation, and then simply disregarded the subsequent steps of appraisal and tender to the damage of citizens who have just claims. The Executive officers frankly took the view that Congress would eventually confiscate the ship, and therefore she could be treated as already confiscated. Thus the *Arauca* sails today in our naval service without any title other than forcible seizure; she has not been put through prize—the time for that has lapsed; nor has she been bought and paid for, on any basis. Neither has she been confiscated. One of your petitioners, tracing this administrative effort to achieve some of the results of prize procedure without doing the thing outright in the standard fashion, examined the matter at some length in an article: Prize Law Reconsidered, which appears in 46 Columbia Law Review, page 69.

Fifteen months after the requisition, and 11 months after Pearl Harbor, the Alien Property Custodian (now the Attorney General) formally "vested" himself of the Hamburg Line's assets, including specifically the Line's claim to just compensation for the *Arauca*. The attachment suits against the Hamburg Line and the rights against the *Arauca*—temporarily inchoate because of her taking by the sovereign—were not altered by that event; the petitioners continued to be defense proctors of record. The Property Custodian made no move to defend his newly vested Fund asset from being diminished by failure of defenses to the six suits.

Six months later, on May 5, 1943, the Maritime Commission made a "token" deposit of $10,000 with the Treasurer of the United States "on account of" just compensation for the *Arauca*, 8 Fed. Reg. 5962. This actually created the Fund, at least "on account". The practical effect was to start the statutory period of 6 months for filing claims against the Fund as substitute for the ship. The 6 months expired on November 5, 1943. Petitioners timely filed their claim in the statutory form of a "libel as in rem in admiralty" for their unpaid fees in the suits which were pending when the requisition took place.

The District Judge held that the petitioners, but for the intervention of the requisition, would have been in position to sue their client for fees and to attach their client's property—namely the ship *Arauca;* and that the Fund stood in place of the ship. He also held that the petitioners were entitled to a maritime lien against the ship and Fund. Having heard testimony as to the services rendered and as to scales of fees prevailing for such work in Miami, he gave a decree for $37,500, less $10,000 retainers paid, or net $27,500. We contend that this was the right and proper action and should be restored by this Court.

The Court of Appeals reversed [1]; it said that the wording of the Idle Vessels Act means that no one may claim

[1] After argument and before decision, Circuit Judge Waller died.

against the Fund unless he had perfected a lien or an attachment proceeding against the ship prior to the moment of requisition. It added that attorneys do not have a lien. And it said that when a client changes his form and uses another lawyer, the adoption of the work of the predecessor attorney by the successor attorney without paying for it "does not merit discussion" (R. 165). We find this last statement profoundly disturbing.

The District Court dismissed the petitioner's claim to be paid by the Attorney-General out of the cash proceeds of the sale of the cargo in his possession. The Court of Appeals did not discuss that point at all.[2]

The District Court found that the petitioners rendered the services alleged. This was not denied; its worth was merely sought to be belittled. On the appeal, the rendering of the services was not attacked or denied; their worth was faintly belittled. There is here no question that the services were rendered, and their value has been duly adjudicated on evidence taken in open court by the District Court, and after a rehearing.

Specifications of Errors to be Urged

The Court of Appeals for the Fifth Circuit erred:

1. In holding that a claim, to be payable out of the Fund, must have been expressed in an attachment actually made prior to the moment of requisition.

2. In holding that petitioners, in the circumstances, did not have a lien, or a maritime lien.

3. In dismissing the rights of a predecessor attorney who is superseded by a successor attorney as "not meriting discussion".

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[2] The Government applied the cargo cash to pay the ship's wharfage, water and other port charges. If cargo money can be used to pay the carrier's water and wharf charge, why not to pay his lawyer's charge?

4. In holding that services which conserve a Fund are not entitled to payment out of that Fund.

5. In failing to hold that petitioners had, at the moment of requisition, a claim which (had requisition not intervened) could have been expressed by a suit with an attachment of the ship.

6. In failing to hold that the petitioners have, under the circumstances of the case, a lien and a maritime lien.

7. In failing to hold that the Alien Property Custodian (now the Attorney General) by "vesting" the assets, rights, etc. of the Hamburg American Line, became the client of the petitioners, and on usual principles should not take over their work and supplant them with his own law staff without paying them for the work they had done.

8. In reversing the decree of the District Court.

Reasons for Granting the Writ

1. This case presents an issue of importance in the construction of the statute for Requisition of Idle Vessels and in the relations of successor lawyers to their predecessors. The incorrect reading of the statute by the Court of Appeals is not merely unjust to these petitioners but may leave a lasting scar upon the administration of similar applications of the law of angary, to which the United States has twice resorted in two great wars—with the Dutch ships in 1917, and with the Danish, etc., ships in 1941.

The Idle Vessels Act plainly contemplates either of two situations, but the Court of Appeals noticed only one of them, and disregarded the other which applies to our case. In this it erred.

A. The first situation considers the party who has on requisition day already acted on his claim and placed the vessel in the custody of the court "from whose custody the vessel may be or has been taken." Such party sues the

Fund in that court. The language appears in the Appendix to this petition, at page 24, lines 3 and 4.

B. The other situation considers the party who has *not*, on requisition day, acted to start a lawsuit. He may sue the Fund in the court "in whose territorial jurisdiction the vessel was lying at the time of requisition." The language appears in the Appendix to this petition, at page 24, lines 4, 5 and 6. It covers our case.

In construing the statute, effect must be given to all the words in it. The Court of Appeals noticed only lines 3 and 4. It did not continue and read lines 4, 5 and 6.

The accidental fact that other parties had sued is of course immaterial as a test of the right of any party who had not sued. Each party's position stands on its own footing; and the custodia legis brought about by others in respect of their claims is not custodia legis as to a party who had not yet sued.

The Court of Appeals says in effect that the citizen must sue and keep resuing from the first day when his rights accrue, at the peril of finding that the Executive of his Government has destroyed his rights by a seizure which, promising that a Fund will replace the seized asset, is interpreted to negate that promise.

This is the very reverse of laches and limitations; it demands the earliest possible assertion of legal rights by filing complaints and attaching property. In our case, it defies the rule of ethics that a lawyer should not sue his client except as a last resort. On requisition day our client was a shipping company which had dealt fairly with us, and was still so dealing. How could we then know that two years later our client would be transformed, by a "vesting", into the Property Custodian and eventually into the Attorney General? Or that he would tell us that in July, 1941, we should have been as sharp and uncompromising with our civil client of that year as he now says we must be towards himself, who now stands in our client's shoes?

What Congress said in the *Idle Vessels Act* [illegible]nat:

> "The Fund so deposited shall be subject to be applied to the payment of the amount of *any valid claim* by way of etc. * * * subsisting at the time of such requisition * * *; the holder of *any such claim may commence* * * * a suit * * * against the Fund * * * etc."

If you have a claim, you may commence against the Fund.

What the Attorney General's lawyer argued, and what the Court of Appeals read this to mean is, that:

> "The Fund * * * shall be subject to be applied to the amount *of any process actually executed* upon such vessel * * * subsisting at the time of such requisition * * *; the holder of *any such executed process* may *commence* a suit * * * against the Fund * * * etc."

Surely one who holds executed process is not graciously allowed to *commence* a suit; he has already commenced it. Such a person no longer has a *claim*. He has a lawsuit and process executed on the ship.

The Idle Vessels Act says plainly that it is the *claim* (and not the lawsuit) that must be subsisting at the moment when the Government seizes the ship. What is a *claim?* It is some right that you can sue on.

These ship seizures prevented suits. In *The Advance,* 45 F. Supp. 547, 1942 A. M. C. 494 (E. D. Pa.),[3] which the Court of Appeals misunderstood, a man who had a claim on seizure day had not yet sued on it. He tried to sue on it four days later. He was dismissed and told that he could not touch a ship which was in the hands of the Government.

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[3] The Fund for the *Advance* (renamed *Trojan*) was created on September 5, 1942, by a deposit of $15,000. 7 Fed. Reg. 7183. General Sugar then was paid out of the Fund.

There was no regularity about creating these Funds. The *Normandie* Fund was set up within six months. 7 Fed. Reg. 5034 (taking, date not stated, in December 1941, Fund, June 6, 1942). The *Arauca* Fund was delayed 22 months. 8 Fed. Reg. 5962 (taking, July 28, 1941, Fund, May 5, 1943). The *Willmoto* Fund was delayed 5 years 11 months (Dec. 1941 to Nov. 7, 1947). 12 Fed. Reg. 7609. The *Wilhelmina* Fund was delayed 4 years. § 11 Fed. Reg. 9992.

The *Advance* was a Finnish flag ship at Philadelphia. The Government took her on December 27, 1941—(five months after taking the *Arauca*). The General Sugar Estates, Inc. filed its libel in rem and in personam with foreign attachment for cargo damage on December 31. On February 19, 1942, the District Court entered its order:

> "The libel is dismissed and the attachment therein is quashed."

There was a rehearing (reported at 45 F. Supp. 548, 1942 A. M. C. 969). General Sugar asked the Court to hold its libel in statu quo until the Fund should be created. The object was obvious—a cargo suit is time-barred after one year, by the Carriage of Goods by Sea Act, 46 U. S. Code 1303 (6). The sugar company could not foresee when or if the Government would create the Fund, any more than it could foresee when (or if) the Government would sequester the ship. The Court declined the application.

The Idle Vessels Act, it may be noted, does not contain any words expressly equivalent to Sec. 32(e) of the Enemy Trading Act, 40 U. S. Code 33 (e), which suspends the running of statutes of limitations during the period that property, an interest, or proceeds are vested in the Custodian. This indicates the haste with which the Idle Vessels Act was thrown together. The suspension must and can be implied.

All such claims, whether in rem or in personam with foreign attachment, are of course subject to being time-barred by strict limitation laws or by laches, which is interpreted in analogy to limitation statutes. Cargo suits must be brought in one year, as already mentioned; salvage suits must be brought in two years. 46 U. S. Code 730. In 1941, the time for an injured longshoreman to bring a "Jones Act" suit was two years. 46 U. S. Code 688 and 45 U. S. Code 55. Most tort suits are limited to two years. Everyone who had a suit on which he had not actually sued on the date when the Maritime Commission decided to sequester the ship to which he looked for se-

curity, was in great alarm, lest his cause become time-barred before the Fund was created. The two rulings in *The Advance* case convinced everyone that it was useless to assert the cause of action within the usual time and ask for a stay until the Fund was created. The conclusion was obvious that, under the very peculiar system of this very unusual statute, it was necessary to wait until the Government men got around to creating the particular Fund for that ship, and then to file the statutory suit against that Fund. This was the course taken in all instances, and the Government never raised any question about claims being time-barred, although many were so barred by the time that the Fund was created.

As a substitute for ordinary time limits, Congress in the original Idle Vessels Act set a special time limit of six months after the Fund was deposited. In view of the great delays, Congress amended this on March 24, 1943, to allow until June 30, 1943, in every case, and until six mo hs after creation of a Fund if that date was later (see Appendix).

We cite another such case where the claimant had not acted on a requisition date, but later sued the Fund and was paid nevertheless. *Sitnek* v. *the Fund,* 49 F. Supp. 72, 1943 A. M. C. 301, D. Md.

The Department of Justice has not previously urged or argued that a claim has no standing unless it has been turned into court process issued and served prior to the instant of requisition. The point is raised for the first time against us, and in the Court of Appeals.

In both the *Advance* and the *Sitnek* cases, the *claim* was *subsisting* but unfiled, unexpressed, not acted on when the requisition occurred. In both cases the claims were paid out of the Funds created for the ships, after the facts of damages, services, etc. were proved.

Symbolic arrests and attachments are quite the usual thing when the Government holds a ship. Literal arrest is not necessary; indeed the Government's possession forbids

it. Judge Chase recently wrote (and Judges Learned Hand and Clark agreed on this point):

> "Just as the ship could symbolically have been arrested in rem in Warren v. U. S., 179 F. 2d 919, whenever it came within the jurisdiction, *so here it could have been symbolically attached,* since it could have been attached had it been owned privately. * * * We think this follows from the Suits in Admiralty Act, giving a remedy equivalent to that a suitor would have, had the vessel been privately owned, *and at the same time protecting the government's ship from attachment.*"

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The reasoning—protection of the Government's property from literal attachment—is as sound for a requisitioned Idle Vessel as for a Government-owned merchantman or public vessel. Literal arrest or attachment is done away with; a symbol is substituted; and that symbol is a proceeding against the Fund as substitute for the ship.

The petitioners say that they should not be discriminated against to enable the Government lawyers who succeeded them in handling these lawsuits to obtain the benefit of the petitioner's work without paying the petitioners their fees. Their work was *in medias res,* and substantial cash retainers had been received, and the "freezing" order was only five weeks old, and the policy as to licenses under the "freezing" order was not yet well formulated nor clearly known. It is preposterous to discover, on nine years' hindsight, that the *valid claim* must, at the claimant's peril, have been reduced to *literal attachment* process served by the Marshal, prior to the instant when the Executive decided to requisition the ship and substitute a Just Compensation Fund for her.

This history, we respectfully submit, shows very plainly and beyond a doubt that the Fifth Circuit was wrong in ruling that your petitioners could not recover because they had failed to file suit and send the Marshal on board with their attachment prior to the instant of seizure. The seizure worked a suspension of rights in respect of "claims" —claims, not lawsuits—and those rights revived, regard-

less of normal statutes of limitations or laches, on the date when the Fund was created by deposit with the Treasurer and public notice in the Federal Register. The revived rights continued in each case until June 30, 1943 or 6 months after the date of deposit, whichever was the later. The revived right, according to the words of the statute, was expressible by "an admiralty libel as in rem against the Fund." The statute said so, regardless of whether the right was an admiralty right, a right in rem, a right on which the plaintiff could attach, or whatever.

The ruling of the Fifth Circuit should be reversed, and that of the District Court restored.

2. All the threads of this case are now collected in the hands of the Attorney General, who is in the triple position of being the Alien Property Custodian, the custodian of the proceeds of the sale of the cargo—some $67,000 net; and the Government's lawyer in all these and other capacities. In 1941 and 1942, it will be remembered, the "freezing" of European assets was in the hands of the Treasury, and Foreign Funds Control was in the State Department, and the Alien Property Custodian was an Independent Agency. But in 1946 the Custodian's office was transferred to the Attorney General; and soon afterwards Foreign Fund Control and the "freezing" matters were turned over to him. There is no further inter-departmental friction; the position taken by the Government in the Fifth Circuit expresses the policy and argumentation and ethics of the Attorney General and his staff, acting pro se and not merely as counsel for another branch of the Government.

The case is thus peculiarly one between lawyer and lawyer. The petitioners were undeniably counsel of record for the Hamburg American Line. The Custodian "vested" that Line, and has often asserted (by counsel supplied by the Attorney General) that he thereby became the Line and was solely entitled to speak for it. It is still the Attorney General's position.

Now it is well settled that a client may change his lawyer; but it is equally well settled that when a client changes his character by a political act, the Court will not permit the outgoing lawyer to be left unpaid while the incoming lawyer benefits by the work done by his predecessor.

Bulk Oil Co. v. *Robins* (The Flush) (C. A. 2d, 1921) 277 Fed. 25 (Judge Rodgers).

Trustees of Greenough (1881) 105 U. S. 527, (Judge Bradley).

Ulster County v. *Brodhead* (1873) 44 Howard (N. Y.) 411.

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The St. Johns (1900) 101 Fed. 469 (S. D. N. Y., Judge Addison Brown).

Glass v. *Layton* (1937-1939) 140 Fla. 522, 192 So. 330.

Nor is this salutary rule less applicable when the client in his new aspect is the Custodian who is the Attorney General who acts as his own lawyer, takes the benefit of his predecessor lawyer's work, and then finds in the Idle Vessels Statute—which his own department phrased—a cramped and narrow reading which, he says, prevents him from attending to the matter of the fee of the lawyer who preceded him in defending the client's cases.

Neither reason nor experience nor ethics could justify a lawyer, however resolved to confiscate or sequester the assets of alien enemies, in assuming such a position towards a citizen and a fellow-member of the American Bar.

3. This is a case of "solicitor and client", such as this Court described in the second footnote to

Sprague v. *Ticonic Bank* (1939), 307 U. S. 161 and 165.

It also has aspects of the "solicitor and third party" situation, which the *Sprague* case deals with directly. Assuredly it is not a "party and party" fee or taxable costs case, and it is not touched by the usual run of litigation about taxing fees against opposing parties. There are no opposing parties left in the *Arauca* Fund situation; every claimant's claim has now been disposed of in one way or another, excepting your petitioners. The Treasurer of the United States as Custodian of the Just Compensation Fund is a mere stakeholder, and the answer filed in his behalf by the United States Attorney merely recites that there are various claimants against the Fund and asks the Court to deal with them, which function the District Court has performed. The Attorney General as Custodian of Alien Property is the only genuine opponent. His lawyer cited to the Court of Appeals a recent Act of Congress laying down the policy that the Custodian shall not make any refunds to Germans without special Congressional authorization.

But it is nowhere alleged or suggested that your petitioners are touched by that law; we are not Germans. Congress has not forbidden payments to citizens of the United States who have valid claims against enemy assets.

4. The statute allows an "attachment lien", and although we do not know exactly what that is, we respectfully claim it. An admiralty attachment is of course never a lien. It is a form of detention of property for jurisdiction and for security. As long as the Marshal holds the attached asset, it is security; if it is released, the security is gone, or transferred to some substitute asset or pledge. An attachment is in no sense a secret lien; it does not follow an asset from hand to hand. It is not a recorded or recordable lien. It is not a possessory lien in the hands of any individual possessor or litigant. The possession of the Marshal is not a lien; it is the physical force of the Court's process. It is security in the hands of the Court.

The Government's lawyers have seemed to argue that when a right to sue and attach has been turned into a

literal attachment, that the plaintiff's security so obtained puts a "lien" on what is attached. But that is quite wrong. Attachment puts the property into possession of the Marshal; he holds it as security.

This ambiguous phrase, "attachment lien" was inserted by the lawyers in the Department of Justice in the spring of 1941 and its ambiguity must of course be construed against the draftsmen (Congressional Record, May 17, 1941, Vol. 48, p. 4033, 3rd column). The Act, having invented the undefined concept of an "attachment lien", proceeds to provide for its enforcement by a libel in admiralty in rem against the Fund. That again is a procedural curiosity, for in admiralty practice the right in rem and the right to attach exist in entirely separate compartments; you have one or the other, but not both. Your petitioners follow the statute. The Attorney General argues that the statute, which his department phrased, prevents him from acting ethically or justly. We pray for a decision relieving him from his doubts.

5. We do respectfully claim a maritime lien. The maritime lien is a judge-made instrument of relief. It is not defined by statute. In its commoner daily aspects its limits are applied in a good deal of rigidity. But on its fringes there is a space for judicial application, extension and contraction, which this Court has utilized in the interests of equity. A strong example is *Krauss Lumber Co.* v. *Dimon SS Co.,* 290 U. S. 117, 1933 A. M. C. 1578. We have a proper case for such relief.

When a client is present in a jurisdiction only by the presence of a ship and cargo, and is present in the United States only in the shape of an agency whose assets are "frozen" in a period of economic emergency, and when the ship asset is requisitioned for title under a statute which allows undefined "maritime liens" to be expressed against the Just Compensation Fund, it is fair and proper to urge that the services which we admittedly rendered may be decreed by the Court to be paid out of the Fund as by way

of maritime lien. If the Court finds that we are entitled to be paid, it is a mere matter of forms of words how the method of payment is expressed.

6. The Court of Appeals cites against us the case of *U. S.* v. *The Antoinetta,* 153 F. 2d 138, 1946 A. M. C. 19 (3rd C. A.), wherein a lawyer was not allowed to have a fee taxed against the opposite party. That case is entirely different. It is a "party and party" case, of the type described in the case of *Sprague* v. *Ticonic Bank,* supra. The lawyer asking fees in that case had consistently opposed the Government's lawyers in every step of the litigation. He was not their predecessor handling the same side of the case. What he had done had not helped the Government's cases; it had hindered them. Furthermore, there was no *Antoinetta* Fund; while that Italian ship had been requisitioned upon a promise of just compensation, she was simultaneously libelled for forfeiture because she had been severely sabotaged in contravention of the statutes and no compensation Fund was ever created. And finally, after the fall of Mussolini, a Liberty ship was given to Italy to replace her, as she had sunk (Exec. Order 9935, 13 Fed. Reg. 1395 (1948)). So that the unfortunate attorney had neither a ship or a Fund nor the usual ethical claim of a displaced predecessor lawyer. This case and others in district courts, concerning the same lawyer's other efforts on behalf of Italian ships, have no bearing on the present case whatever.

7. The work that we did to justify the fees awarded is fully set forth in the record. No one denies the work was done. The Hamburg Line wrote an official letter that our services were satisfactory, and that payment of fees by the Court out of the *Arauca* Fund or the Cargo Fund would be agreeable. The District Judge mentioned this. The Court of Appeals did not; it was apparently one of the matters "not meriting discussion".

8. The Court of Appeals supported its denial of relief and reversal of the District Court by saying (R.): "However, they do have an appropriate remedy under the Trading with the Enemy Act * * * and this record shows that they have already filed their suit against the Custodian in the District of Columbia." That remedy, we have found, either is useless or imposes another heavy task; for the Department of Justice Alien Property Office has received claims for over a million dollars and has collected in the "vested" estate less than $200,000. The Office says the Estate is insolvent, and definitely declines to pay any claims, whether or not entitled to priority against the cash on hand. The Office has failed and refused and neglected to bring into the vested Estate the value of this very ship *Arauca*, and the value of another ship, and the values of their cargoes. If those values were brought in, it is our information and belief that the Estate will be solvent. It is, we submit, no answer to a party who has two courses open to him to say that he should not pursue this course because he can pursue another course; or even that he is pursuing both courses at once. If this Court should deny this petition, and relegate us to the other course against the Alien Property Office of the Department of Justice, we say very respectfully to the Court that our next step must be an application for mandamus to compel the Attorney General to perform the ministerial task of collecting from the Maritime Board and elsewhere the requisition Just Compensation for these ships and cargoes so that the Estate to which the Circuit Court refers will have the assets necessary to enable proper claims to be paid. It is respectfully suggested that such administrative and judicial circuity can be minimized by granting this writ.

CONCLUSION

The writ should be granted as prayed for.

Respectfully submitted,

ARNOLD W. KNAUTH,
Pro se.

APPENDIX

Statutes Involved

1. Pertinent provisions of the Ship Requisition Act of June 6, 1941, 55 Stat. 242, as amended (50 U. S. C. App. Sec. 1271) (italics supplied):

> Whereas Congress has power to provide for the common defense and general welfare and to regulate commerce with foreign nations and whereas for this purpose embargo Acts and nonintercourse Acts have from time to time been passed and whereas the commerce of the United States is at the present time interrupted and the general welfare of its citizens is threatened and an emergency has been declared, for the purposes of national defense, during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, * * * or take over the title to, * * * any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, * * * and which is necessary to the national defense: *Provided,* That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended [section 1242 of Title 46]: *Provided further,* That such compensation hereunder, or advances on account thereof, shall be deposited with the Treasurer of the United States, and the Fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of *any valid claim* by way of mortgage or maritime lien or attachment lien upon such vessel, or of any stipulation therefor in a court of the United States, or of any State, *subsisting at the time of such requisition* or taking of title or possession; *the holder of any such claim may commence* prior to June 30, 1943, or within six months after the first such deposit with the Treasurer

and publication of notice thereof in the Federal Register, whichever date is later, and maintain *in the United States district court* from whose custody such vessel has been or may be taken *or in whose territorial jurisdiction the vessel was lying at the time of requisition* or taking of title or possession, *a suit in admiralty* according to the principles of libels in rem *against the fund,* which shall proceed and be heard and determined *according to the principles* of law and to the rules of practice obtaining *in like cases between private parties,* and any decree in said suit shall be paid out of the first and all subsequent deposits of compensation; and such suit shall be commenced in the manner provided by section 2 of the Suits in Admiralty act [section 742 of Title 46] and service of process shall be made in the manner therein provided by service upon the United States attorney and by mailing by registered mail to the Attorney General and the United States Maritime Commission and due notice shall under order of the court be given to all interested persons, and any decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction: * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 370

ARNOLD W. KNAUTH AND CODY FOWLER,
PETITIONERS

v.

THE UNITED STATES OF AMERICA AS CLAIMANT TO AND CUSTODIAN OF THE FUND DEPOSITED WITH THE TREASURER OF THE UNITED STATES ON ACCOUNT OF JUST COMPENSATION FOR THE SS ARAUCA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (R. 110) is reported in 1950 A.M.C. 1434. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 155) is reported in 183 F. 2d 874.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1950 (R. 165). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether proctors in admiralty, for their legal services in defending the owner of a vessel against suits in admiralty, have a claim against the vessel by way of a maritime or attachment lien within the meaning of the Ship Requisition Act of June 6, 1941.

STATUTES INVOLVED

The pertinent portions of the Ship Requisition Act of June 6, 1941, 55 Stat. 242, as amended, 50 U. S. C. App. 1271, and of the Trading With the Enemy Act of 1917, as amended, 50 U. S. C. App. 1, *et seq.*, are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

Petitioners are seeking to recover the sum of $37,500.00 as proctors' fees for services rendered to the owners of the vessel *Arauca*, out of the fund deposited with the Treasurer of the United States, representing just compensation for the vessel upon its requisition. The petitioners represented the Hamburg-American Line, a German corporation, and owner of the *Arauca*, in certain admiralty proceedings. These admiralty proceedings were seven libels *in personam* brought during the years 1940 and 1941 on behalf of various cargo owners and underwriters against the Hamburg-American

Line. The suits were brought in the Miami Division of the Southern District of Florida with prayers for writs of foreign attachment against the *Arauca*. The vessel was not involved in the transactions giving rise to the libels, but it was within the jurisdiction of the district court when each of the libel proceedings was commenced, and it was taken by the marshal under the writs of attachment into the custody of the district court. (R. 105-106, 156.)

On July 28, 1941, the Maritime Commission, acting under the authority of the Ship Requisition Act (Appendix, *infra*, pp. 10-12), requisitioned and took possession of the *Arauca*, thereby taking the vessel out of the custody of the district court (R. 106). The Act provides that the amount of just compensation for a taking under this Act shall be deposited with the Treasurer of the United States, and this fund is subject to the payment of any "valid claim by way of mortgage or maritime lien or attachment lien upon such vessel," or "of any stipulation therefor" in a court, "subsisting at the time of such requisition." (Appendix, *infra*, pp. 11-12). The Act further provides that if a suit in admiralty was pending against the vessel when it is taken, the suit may be continued, according to principles of libel *in rem*, against the fund. A preliminary payment of $10,000.00 has been made on account of the requisition of the *Arauca* (R. 106).

On December 11, 1941, when the United States declared the existence of a state of war against

Germany, the Hamburg-American Line became an enemy alien. Thereafter, on October 28, 1942, the Alien Property Custodian issued Vesting Order No. 126 (7 F. R. 7061), vesting in himself all property of any nature whatsoever belonging to the Hamburg-American Line (R. 106-107). The attorneys for the United States thereupon took over the defense of the libel proceedings and brought them to a conclusion (R. 108).

Petitioners had received a total of $10,000.00 from the Hamburg-American Line on account of their legal services (R. 107). They had no agreement for a lien upon the *Arauca* (R. 22). On November 5, 1943, the petitioners instituted a claim against the just compensation fund for unpaid disbursements and legal fees (R. 4, 107-108), claiming that as a matter of law they had a claim by way of attachment or lien against the *Arauca* to secure payment for their legal services. The district court held that they could have secured a lien had the *Arauca* not been requisitioned, and therefore they did secure "what amounts to an attachment lien" (R. 111). It accordingly awarded petitioners a sum representing what it deemed their services to be worth, less the sums which they had received from the Hamburg-American Line (R. 110, 112). The court of appeals reversed this decision, holding that neither under the statute nor under the admiralty law did petitioners have any lien against the vessel for legal services rendered to the Hamburg-American Line. Nor could they,

the court below held, be paid out of the fund on the ground that their services created the fund. Their only claim was one against the Hamburg-American Line itself, which they could assert against the Alien Property Custodian under Section 34 of the Trading With the Enemy Act, Appendix, *infra*, p. 2, (R. 155-162).[1]

ARGUMENT

The decision of the court below is correct and does not warrant review by this Court.

1. It is well settled that a proctor in admiralty obtains no lien on a vessel for professional services to the vessel owners in defending the vessel. *Gray* v. *Hopkins-Carter Hardware Co.*, 32 F. 2d 876, 879 (C. A. 5); *Johnson Lighterage Co.*, 248 Fed. 74, 82 (C. A. 3); *The Jeanette*, 9 F. 2d 408 (S.D. Fla.); *United States* v. *The Pietro Campanella*, 81 F. Supp. 475, 483 (D. Md.); *United States* v. *San Guiseppe*, 1948 A. M. C. 78 (E. D. Va.); *United States* v. *Laconia*, 1948 A. M. C. 1870 (E. D. Va.). The case of *Bulk Oil Transports, Inc.* v. *Robins Dry Dock & Repair Co., et al.*, 277 Fed. 25 (C. A. 2), upon which the district court relied (R. 110), is irrelevant because it enforced an attorney's lien only upon papers in his possession. Petitioners' reference (Pet. 17) to the decisions dealing with compensation for a predecessor lawyer is

[1] Petitioners also assert a claim against the proceeds of the cargo (Pet. 2), but this claim is not in their original petition (R. 6), nor was it passed on by the district court or the court below.

pointless since none of the lawyers secured a lien for his services upon vessels involved in the litigation. The rule denying any maritime liens to attorneys also disposes of petitioners' argument that their claim for services in this case deserves a fresh judicial creation of a lien upon the compensation fund. *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.*, 290 U. S. 117, cited by petitioners (Pet. 19), held only that the principle supporting the established lien of a cargo shipper for wilful freight overcharges can be extended to include overcharges by mistake.

Petitioners can, therefore, find no support for their claim in the legal principles governing compensation for attorneys in admiralty proceedings, apart from the Ship Requisition Act.

Their attempt to find support for their claim in the Act is equally unavailing. Petitioners urge first that the Act authorizes payment of any claim, whether or not it is a claim by way of attachment or lien (Pet. 11-16), but this argument flies in the teeth of the language of the Act, and the cases of *The Advance*, 45 F. Supp. 547 (E. D. Pa.) and *Sitnek* v. *The Fund*, 49 F. Supp. 72 (D. Md.), cited by petitioners (Pet. 13-14), are not in point. In *The Advance*,[2] the proceeding was dismissed be-

[2] Petitioners suggest that the claim in *The Advance* case was eventually paid (Pet. 12, n. 3). If it was, there is no showing why it was done, whether as a matter of grace or mistake or upon new evidence. The time lag in establishing a fund is of no legal significance since the Act protects liens subsisting at the time of the requisition.

cause there was no attachment lien against the vessel in existence when the vessel was requisitioned, while the *Sitnek* claim was allowed because it met this statutory requirement.

Petitioners next argue that the Ship Requisition Act created a claim by way of attachment or lien for an attorney who renders service to a vessel which, at the time of its requisition. is in the custody of a federal court under admiralty proceedings (Pet. 18-19). There is nothing in the language of the Act which supports such a construction. On the contrary, the plain language of the Act, providing for a compensation fund and for payment out of that fund of claims by way of maritime lien or attachment lien upon the vessel subsisting at the time of the requisition, leaves no reasonable doubt that the sole purpose of the provision was to create a substitute for a vessel taken while in the custody of an admiralty court. See *Hamburg-American Line* v. *United States*, 168 F. 2d 47, 53 (C.A. 1). The legislative history of the Act shows affirmatively that this was the only purpose of the language providing for a compensation fund.[3] The Act did not, therefore,

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[3] Senator George who introduced the provision as a floor amendment, said (84 Cong. Rec. 4033):

> * * * the whole purpose of the amendment which I suggested was that in the case of the arrest of a ship under a proceeding in admiralty, and therefore already in the hands of the courts at the time of the requisitioning or the taking over under this act, the purchase price should be paid into the registry of the court, so that the claimant

create any liens but only a method of enforcing established liens—a conclusion which has been reached by other courts which have held that the fund is not a source of payment of proctors' fees. *United States* v. *The Pietro Campanello, supra; United States* v. *San Guiseppe, supra; United States* v. *Laconia, supra.*

2. Petitioners' argument that they are entitled to payment out of the fund, on the ground that their legal services aided in creating the fund, is without merit. The fund is a payment on account of compensation for the taking of the vessel and will presumably represent the value of the vessel at the time and place of its taking. *United States* v. *New River Collieries Co.*, 262 U. S. 341. Since petitioners' services in no way affected this value, they in no way augmented the amount of the fund. Consequently, petitioners' case does not come within the principle of *Sprague* v. *Ticonic National Bank*, 307 U. S. 161. Petitioners were solely concerned with defending the interest of the owner as against other claimants to the fund; they served the owners of the *Arauca*, not the *Arauca*. Hence, their claim for fees is grounded on no equitable

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might proceed against the fund as if the ship had not been disposed of or taken over by the Government. This particular form of amendment * * * would seem to accomplish the same purpose * * *

My amendment simply proposed that if the vessel had been seized and was in the course of administration, the compensation paid should be paid into the registry of the courts, * * * so as to protect lien holders for any claims they might have on the property.

right to be paid from the compensation fund as distinguished from the general property of their client, the former owner of the vessel. Whatever claim petitioners have is one against the Hamburg-American Line, the owner of the vessel at the time of the requisition, which they may assert against the property of that Line now in the hands of the Alien Property Custodian.[4]

CONCLUSION

The decision below is correct, and there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

SAMUEL D. SLADE,
JOSEPH KOVNER,
Attorneys.

NOVEMBER 1950

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[4] Petitioners, as noted by the court below (R. 161), have filed a claim for their legal services to the Hamburg-American Line against the Alien Property Custodian, under Section 34 of the Trading With the Enemy Act (Appendix, *infra*, p. 12).

APPENDIX

1. The pertinent provisions of the Ship Requisition Act of June 6, 1941, 55 Stat. 242, as amended (50 U.S.C. App. 1271):

> Whereas Congress has power to provide for the common defense and general welfare and to regulate commerce with foreign nations and whereas for this purpose embargo Acts and nonintercourse Acts have from time to time been passed and whereas the commerce of the United States is at the present time interrupted and the general welfare of its citizens is threatened and an emergency has been declared, for the purposes of national defense, during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense: *Provided,* That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended [section 1242 of Title 46]: *Provided further,* That such compensation hereunder, or advances on ac-

count thereof, shall be deposited with the Treasurer of the United States, and the fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of any valid claim by way of mortgage or maritime lien or attachment lien upon such vessel, or of any stipulation therefor in a court of the United States, or of any State, subsisting at the time of such requisition or taking of title or possession; the holder of any such claim may commence prior to June 30, 1943, or within six months after the first such deposit with the Treasurer and publication of notice thereof in the Federal Register, whichever date is later, and maintain in the United States district court from whose custody such vessel has been or may be taken or in whose territorial jurisdiction the vessel was lying at the time of requisition or taking of title or possession, a suit in admiralty according to the principles of libels in rem against the fund, which shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties, and any decree in said suit shall be paid out of the first and all subsequent deposits of compensation; and such suit shall be commenced in the manner provided by section 2 of the Suits in Admiralty act [section 742 of Title 46] and service of process shall be made in the manner therein provided by service upon the United States attorney and by mailing by registered mail to the Attorney General and the United States Mari-

time Commission and due notice shall under order of the court be given to all interested persons, and any decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction: * * *

2. The pertinent provisions of Section 34 of the Trading With the Enemy Act of 1917, as amended (50 U.S.C. App. 34):

> SEC. 34 (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. * * *

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